Supreme Court, U. S.
FILED
APR 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

United States Supreme Court

OCTOBER TERM, 1974

No. 74-768

CLARENCE BROWN,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION, *et al.*

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner Clarence Brown submits this reply memorandum in support of his Petition for a Writ of Certiorari.

The Court of Appeals decided three questions of law, each of substantial significance to the elimination of discrimination in federal employment. The government does not deny the importance of the issues involved; on the contrary, government attorneys throughout the country are giving ample demonstration of that importance by relying on similar arguments, and increasingly on the decision below, to obstruct any remedy for such discrimination in scores of cases.

The first holding of the Court of Appeals was that Congress, in adopting Section 717, tacitly repealed half a dozen other statutes creating federal jurisdiction over claims of federal employment discrimination. Petition, pp. 13a-17a. That holding is in conflict with two decisions of this Court

as well as the decisions of five courts of appeals. Petition, pp. 7-9. The Solicitor General, however, declines to defend or discuss the correctness of this holding.

The second holding of the Court of Appeals was that section 717 applies to acts of discrimination occurring prior to its effective date, March 24, 1972. Petition, pp. 9a-13a. This holding is in conflict with the holdings of one court of appeals and six district courts. See *Place* v. *Weinberger*, No. 74-116. The holding, and the government's argument in the Second Circuit, are in conflict with the government's position in three other circuits and twenty district courts. *Id.* The Solicitor General, however, declines to defend or discuss the correctness of this holding.

The third holding of the Court of Appeals was that a federal employee who exercises his right to sue under section 717 without appeal to the Appeals Review Board automatically loses his right to sue under 42 U.S.C. § 1981 or any other statute. This holding is in conflict with the decisions of two courts of appeals[1] and with the position taken by the government in *Johnson* v. *Railway Express Agency*, No. 73-1543. The Solicitor General, however, declines to defend or discuss the correctness of this holding.

Rather than deal with the actual decision below, the Solicitor General now advances a position never raised before or considered by the District Court or Court of Appeals—that a federal employee who sues after the completion of agency action under section 1981 or any statutes other than section 717 must commence that action within 30 days of final agency action. Brief for Respondents in Opposition, pp. 5-7. This proposal is different from the

[1] *Guerra* v. *Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974); *Macklin* v. *Spector Motor Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973).

holding of the Court of Appeals—which forbade any such suit without an appeal to the Appeal Review Board—and is not supported by the language or legislative history of section 717, section 1981, or any other statute. The proposal, rather, represents an attempt by the government to fashion out of thin air an exhaustion rule hopefully more defensible than that of the Court of Appeals yet still strict enough to win this particular case. The Solicitor General suggests that this new rule, first conceived by government attorneys in April 1975, be applied retroactively to petitioner's actions of March 1973, so as to penalize him for failing to anticipate the exhaustion requirements the government would advance two years later.

The government's new position suffers from the same defects as its earlier position in, and the holding of, the Court of Appeals. Petition, pp. 13-19. Moreover no such exhaustion argument could be resolved in favor of the government on the record of this case. Any contention that a party failed to exhaust his administrative remedies necessarily raises two questions of fact—whether administrative proceedings were already so long as to make further delay unreasonable, and whether there was a reasonable chance that the result of further administrative proceedings would be favorable to the grievant. *Smith* v. *Illinois Bell Telephone Co.*, 270 U.S. 587 (1926), *City Bank Farmers' Trust Co.* v. *Schnader*, 291 U.S. 24 (1934). It is clear that a dispute of fact exists on just these questions. The government urges that the appeal might have resulted in the relief sought.[2] Petitioner maintains that the appeal process is little more than a sham, that the Appeal Review Board upholds the agency decision in at least 98% of all cases, and that the Board has never awarded back pay or pro-

[2] Brief for Respondents In Opposition, p. 6.

motion to a minority employee except where the agency conceded there was discrimination.[3] Petitioner also maintains that further delay was unreasonable in view of the fact that the government had already exceeded by 14 months the deadline for agency decision imposed by Civil Service Commission regulations.[4] This case comes to this Court on a government motion to dismiss for lack of subject matter jurisdiction; in considering such a motion, like a motion for summary judgment, disputes of fact must be resolved against the moving party. In the instant case, moreover, neither court below had an opportunity to consider this dispute of fact—the exhaustion issue was neither raised by the government in the District Court nor briefed by either party in the Court of Appeals. It would clearly be unfair to dismiss the instant complaint, or to deny Certiorari, without granting petitioner a hearing in any court on his contention that on the facts of this case further efforts at exhaustion should not have been required.

Certiorari is singularly appropriate in a case such as this involving three distinct holdings, each creating a conflict among the circuits and each of substantial importance. That is particularly so in view of the fact that the respondents decline to defend the correctness of any of those holdings, and one of the conflicts results directly from the government's advancing inconsistent positions in different circuits. See *Place* v. *Weinberger,* No. 74-116. The appropriateness of granting the writ is in no way lessened because, while government attorneys throughout the country are urging other courts to follow the broad precedents set by the Second Circuit, the Solicitor General opposes Certiorari in this case on the ground that, while those holdings

[3] Petition, p. 15.

[4] Petition, pp. 5, 15.

may well be wrong, the government believes the result might be justifiable on a different and narrower ground never presented to or considered by the courts below.[5]

Respectfully submitted,

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[5] Since the filing of the Petition for Writ of Certiorari, petitioner has been transferred to another government agency. That lateral transfer has no effect on his claim for back pay or for injunctive relief.